Supreme Court, U.S.
FILED

No. 03-1471 APR 21 2004

In The

Supreme Court of the United States

JAMES L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT C. BONSIB
MARCUS & BONSIB
6411 Ivy Lane, Suite 116
Greenbelt, Maryland 20770
(301) 441-3000
Attorney for the Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

I. Whether the Court of Appeals for the Fourth Circuit erred in not giving substantial deference to the findings of the district court and erred in holding that the district court abused its discretion in finding that the Petitioner's family situation constituted an "extraordinary family responsibility" under U.S.S.G. 5H1.6 and in finding that a downward departure was appropriate under U.S.S.G. 5K2.0 based upon an accumulation of factors.

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OPINION BELOW

The Court of Appeals for the Fourth Circuit did not select its opinion for publication in the Federal Reporter. The decision is reported at 85 Fed. Appx. 925. The district court did not publish an opinion in this case. Its pertinent rulings from the bench are reprinted in the Appendix at 1-33.

JURISDICTION

The Court of Appeals for the Fourth Circuit filed its decision on January 22, 2004. This Court has jurisdiction under 28 U.S.C. 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

U.S.S.G. 5H1.6 Family Ties and Responsibilities, and Community Ties (Policy Statement)

Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of restitution or fine.

U.S.S.G. 5K2.0 Grounds for Departure (Policy Statement) (Partial)

Under 18 U.S.C. 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists

an aggravating or mitigating circumstance of a kind, or to a degree, not adequately into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C. 3553 Imposition of Sentence

(b)(1) **In general.** – Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4), unless the court finds that there exists an aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. . . .

STATEMENT OF CASE

The Petitioner was convicted of conspiracy to defraud the United States government in violation of 18 U.S.C. 371 and of filing false claims upon the United States government in violation of 18 U.S.C. 287. App. 2. The district court calculated the Petitioner's sentence, prior to consideration of any departures, at an offense level of 17 with a criminal history category of I, for a pre-departure sentencing range of a minimum of 24 months. App. 37, 45. The district court then concluded that a downward departure, pursuant to U.S.S.G. 5H1.6 (extraordinary family circumstances) and U.S.S.G 5K2.0 (combination of factors) was appropriate and granted the Petitioner a nine level downward departure for a final offense level of 8 App. 45, 46. The district court then sentenced Petitioner to a three year probationary sentence with intermittent confinement for thirty weekends. App. 2, 46, 47. The government appealed from

the Petitioner's sentence. App. 3. The Court of Appeals for the Fourth Circuit reversed the district court with respect to its sentence of the Petitioner and remanded the matter for re-sentencing. App. 28-33.

In reaching its decision the district court clearly recognized and considered that a 5H1.6 departure for extraordinary family circumstances was a "discouraged" factor for departing from the Guidelines and that district courts "would rarely resort or rely on that guideline for a departure." App. 35. Nevertheless, exercising the discretion vested in the district court as that part of the judiciary, and based upon the institutional advantage that the district court has in determining what is an unusual or exceptional case, the district court concluded that it was satisfied that [Petitioner's case] "is that extraordinary case, I am absolutely satisfied." App. 35. Continuing the district court found that " . . . it's not just Adam, the autistic son, whose life will be – I don't want to overstate this, but both Adam's and Mrs. Yates' life will be so undermined, and their support system will be so at risk if Mr. Yates is away from them for an extended period of time, that I believe and I find that this is the extraordinary circumstance in this rare disfavored guideline." App. 35.

The district court was so convinced of the extraordinary nature of the Petitioner's family circumstances that it continued the sentencing hearing from the date on which Petitioner's wife testified and the other evidence of the Yates' family circumstances were presented to insure that it did not act under the immediate "emotional spell" it explained was present in the courtroom after listening to the compelling testimony during that sentencing hearing. App. 36.

When the sentencing hearing continued at a later date, the district court indicated that it found by clear and convincing evidence that based upon the testimony and evidence presented during the sentencing hearing, that unless it fashioned a departure for the Petitioner that resulted in a sentence of less than 24 months to the Bureau of Prisons that the Yates' family would be destroyed. App. 37. The district court further explained that a sentence of 24 months would "destroy this family by destroying Mrs. Yates and casting Adam into an abyss out of which [the district court was] absolutely convinced [Adam] would never climb out of." App. 37, 38.

In announcing its departure decision the district court recognized that while family responsibilities will almost never rise to the level of an extraordinary circumstance to justify a departure, it was convinced that this case was atypical and exceptional. App. 38.

In addition to professional assessments of Adam and the testimony of Mrs. Yates, the district court also noted its reliance upon a letter written by an attorney recognized by the district court to be "a very well-known, very highly respected practitioner of law in the area of special-needs children." This attorney had represented the Yates' family in its efforts to get special education assistance for Adam, the Petitioner's son. The district court remarked how this assessment supported the district court's departure decision and specifically noted how the assessment "presents a compelling case for the impact of [the Petitioner's] long-time and long-term incarceration." App. 38, 39. The district court quoted, in part, from the assessment:

> "I know that you must impose a penalty on Jim, which you feel fits the crime. I have no doubt that you will do what you believe is just. I ask that in

> making your decision you consider the profound impact Jim's incarceration will have on a child who cannot begin to understand why his father is no longer available to him. Adam *will* regress emotionally and developmentally. The only unknown is how much he will regress and whether he will ever recover from his regression. Children with PDD often do not recover from significant regression, especially a child Adam's age."

App. 39.

The district court observed how Mrs. Yates' testimony showed "what can only be characterized as an otherworldly commitment to a child whose special needs exceed the bounds of parental capability." App. 36.

The district court recognized the rarity of cases where a downward departure pursuant to 5H1.6 and 5K2.0 would be appropriate. It fully recognized the "discouraged nature of the departure" and it carefully considered the extensive record before it and its experience as a sentencing court to properly conclude that the Petitioner's family circumstances were truly "extraordinary" as contemplated by 5H1.6 and that when considered with the Petitioner's own medical and psychological ailments also justified granting a departure pursuant to 5K2.0. App. 44, 45, 46.

The Court of Appeals for the Fourth Circuit erred in failing to grant substantial deference to the careful and fact-based determination made by the district court, after a full evidentiary hearing and upon a detailed factual record, that the Petitioner's case was "extraordinary," and in concluding that the district court abused its discretion

in determining that the Petitioner qualified for a downward departure pursuant to both 5H1.6 and 5K2.0.

REASON FOR GRANTING PETITION

In *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1966), this Court recognized that while the Sentencing Reform Act of 1984, as amended, 18 U.S.C. 3551, et seq., 18 U.S.C. 991-998, limited the broad discretion that judges enjoyed prior to the enactment of the Act, the Act did not eliminate all of the district court's discretion. 518 U.S. at 91, 116 S.Ct at 2043-4. In classifying the factors that are apt or not apt to make a case atypical, this Court recognized that with respect to discouraged factors, such as 5H1.6, the Sentencing Commission did not view discouraged factors "as necessarily inappropriate" bases for departure although this Court has indicated that they should be relied upon on only "in exceptional cases." 518 U.S. at 95, 116 S.Ct. at 2045 Continuing, this Court further stated that "if the special factor is a discouraged factor, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." 518 U.S. at 97, 116 S.Ct. at 2045.

This Court made clear that Congress did not intend to vest in appellate courts wide-ranging authority over district court sentencing decisions and that the Congress intended that appellate courts give due regard to the opportunity of the district court to judge the credibility of witnesses and that the appellate courts "shall accept the findings of the district court unless they are clearly erroneous." 518 U.S. at 96, 116 S.Ct. at 2046. This Court re-affirmed that "it is not

the role of the appellate court to substitute its judgment of the sentencing court as to the appropriateness of a particular sentence" and noted that "a district court's decision to depart from the Guidelines will be due substantial deference for it embodies the traditional exercise of discretion by a sentencing court." 518 U.S. at 97-98, 116 S.Ct. at 2046. Further, this Court reminded that district courts have an institutional advantage over appellate courts in making sentencing determinations in that the district courts have an informed vantage point because of its day-to-day experience in criminal sentencing. 518 U.S. at 98, 116 S.Ct. at 2046-7.

The Court of Appeals for the Second Circuit took this Court's directive to heart when it reminded and reaffirmed the importance of affording substantial deference to the district court in sentencing determinations as the district court serves as the "eye of the comparer" because it is in the best position to make comparisons among cases and decide what combinations of circumstances takes a case out of the ordinary and makes it exceptional. *United States v. Galante*, 111 F.3d 1029, 1034 (2d Cir. 1997), *rehearing denied in banc*, 128 F.3d 788 (2d Cir. 1997).

Here, the Fourth Circuit failed to accord to the district court judge the substantial deference that was appropriate and required under *Koon* and simply substituted its judgment for that of the district court on the issue as to whether the facts in Petitioner's case were "extraordinary." It failed to recognize what this Court had recognized in *Koon*, which is that the district courts are on the front line on issues regarding criminal sentencing. It is the district court that must decide whether a particular case is unusual and it is the district court that uniquely possesses the experience and perspective to make such decisions.

While the Fourth Circuit summarily concluded that the district court abused its discretion in finding that the Petitioner's family circumstances were extraordinary, it failed to explain how it could reach that conclusion despite the detailed and informed rationale announced by the district court when explaining its departure decision. Interestingly the Fourth Circuit, while acknowledging the "possibility" of a 5H1.6 departure, has never upheld such a departure nor indicated what factual predicate would be sufficient to support such a departure.

Not only should this Court grant this Petition to correct the failure of the Fourth Circuit to afford substantial deference to the district court's findings, the Fourth Circuit's decision is in direct conflict with numerous other Circuit Court decisions which, after using the substantial deference standard, have sustained 5H1.6 departures under circumstances that, the Petitioner respectfully submits, are not nearly so "extraordinary" as those found by the district court to exist in Petitioner's case and which would, under the standard employed by the Fourth Circuit, have inevitably been reversed by the Fourth Circuit as an abuse of discretion.

A discussion of a sampling of some of these Circuit Court opinions follows.

In *United States v. Pena*, 930 F.2d 1486 (10th Cir. 1991), the district court departed from a guidelines range of 27 to 33 months to 5 years probation on the basis that the defendant was a single parent of a two month old child, the sole support for herself and her child, that she had been steadily employed for a long time providing financial support for her 16-year-old daughter who herself was a single parent of a 2-year-old child and that

incarceration for an extended period of time would put the two infants at risk. That, together with the defendant's lack of a prior record and absence of any evidence that she possessed a threat to the public and could otherwise adequately be punished and rehabilitated caused the Tenth Circuit to conclude that the circumstances cited by the district court were sufficient to justify a departure from the guidelines. At 1494.

Similarly in *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992), the Second Circuit sustained a downward departure based upon the facts establishing that the defendant was a single mother with a institutionalized daughter, age 21, who was the mother of a 6-year-old child residing with the defendant. Also residing with the defendant were her son and two other children ages 5, 6, as well as a 2-month-old child. The father of the youngest child was unemployed. The defendant exhibited no signs of drug or alcohol abuse and had no other mental or emotional problems and was solely responsible for the upbringing of four young children. Noting that if the Sentencing Commission had intended an absolute rule that family circumstances may never be taken into account it would have said so. However, it said that Section 5H1.6 phrases and confirms the Commission's understanding that while ordinary family circumstances do not justify departure extraordinary family circumstances may. At 129.

In *United States v. Gaskill*, 991 F.2d 82 (3d Cir. 1993), the Third Circuit remanded to the district court for resentencing in a family circumstances case where the district court underestimated its power to depart. At 87. The Third Circuit noted that the record demonstrated circumstances quite out of the ordinary in that the degree of care required for defendant's wife was such that the

defendant performed all household chores, had to administer medication to her, and generally had to be around to attend to her medical condition which required her to spend 16 hours a day in bed. That, together with the lack of close supervision by any other family member other than the defendant and the attendant risk to the wife's well being, together with the lack of any threat to the community and the relatively brief imprisonment sentence called for the guidelines, all justified the district court exercising its discretion to grant a 5H1.6 departure. At 86.

In *United States v. Sclamo*, 997 F.2d 970 (1993) the First Circuit sustained a downward departure pursuant to 5H1.6 where, for some 3 years, the defendant had been living with a woman and her two children with whom he had developed a special and crucially important relationship particularly as it related to a 12-year-old boy. At 972. In a factual situation very similar to that of the Petitioner, letters from the psychologist confirmed the importance of the defendant's continued relationship with the young child. *Id.* The court concluded that Sclamo's situation was readily distinguished from ordinary cases where one can only speculate about the stresses that incarceration of a family member might cause in this case, further noting that there was evidence that not only did the young boy suffer from a clinical disorder, but that his condition would deteriorate if the defendant were incarcerated. That, considered together with Sclamo's track record of steady and effective support and guidance of the boy over a lengthy period time and the psychologist's prognosis that the child would risk regression and harm if the defendant were incarcerated, sufficiently supported the district court's determination to grant a downward departure. At 974.

In *United States v. One Star*, 9 F.3d 60 (8th Cir. 1993), the Eighth Circuit sustained a downward departure under 5H1.6 from a Guidelines range of 33 to 41 months to 5 years probation where the defendant was the sole means of support for 9 members of his extended family. At 60.

In *United States v. Johnson*, 964 F.2d 124, 129 (2d Cir. 1992), the Second Circuit upheld a downward departure where the record established that the defendant was solely responsible for the upbringing of 3 children and her grandchild and faced more than the responsibilities of an ordinary parent and more than those of an ordinary single parent.

In *United States v. Dominguez*, 296 F.3d 193 (3d Cir. 2002), the Third Circuit ordered a re-sentencing finding that the district court erroneously concluded that it did not have the discretion to grant a 4 level downward departure based upon the extraordinary family circumstances and needs of the defendant. At 194. The record established that the defendant resided with her elderly parents who were physically and financially dependent upon her, that the parents could not afford paid assistance, that her father had undergone brain surgery, and suffered a heart attack, was non-ambulatory, was obese, incontinent, had significantly impaired mental ability and experienced difficulty speaking and that her mother had severe arthritis and heart problems which prevented her from caring for her husband. At 194.

It is significant that district court judges, who sentence defendants on a daily basis, are the eyes of what constitutes the norm and have the experience to determine what is an atypical case. In the instant case, the district court judge is an experienced jurist who recognized and articulated the basis for his finding that extraordinary and

rare family circumstances existed in this case sufficient to justify the departure granted by the district court.

The Fourth Circuit essentially ignored the detailed and compelling factual record upon which the district court based its finding that the Petitioner's family circumstances were "extraordinary" and that both under 5H1.6 and 5K2.0 a downward departure was appropriate. In this case where the district court conducted a painstaking and measured review of the family circumstances, evaluated the nature of these circumstances and made a credibility assessment, its conclusions were entitled to, but were not accorded, substantial deference. The Fourth Circuit erred in concluding that the district court abused it discretion in finding that the Petitioner's family and personal circumstances were extraordinary. In reversing the district court the Fourth Circuit stated that "[a]lthough we sympathize with Yates' situation, the record fails to demonstrate that the care he provides is 'irreplaceable.' To the contrary, the evidence reflects that it is Mrs. Yates, Adam's primary caregiver, rather than Mr. Yates who is 'irreplaceable.'" App. 32. The Fourth Circuit then, essentially ignoring the reasons and findings of the district court, minimized the Petitioner's family circumstances and the effect of Petitioner's lengthy incarceration on the family, blandly equating it with "what any family might face if the primary wage earner were sentenced to continuous imprisonment." App. 31-2. The Fourth Circuit failed to grant the required substantial deference to the district court's sentencing findings. It erroneously concluded that the Petitioner's family and personal circumstances were "ordinary" and clearly misunderstood the proper standard of review and substantial deference it was required to afford to the district court's decision. Furthermore, it erred

in concluding that, absent a finding that the Petitioner was "irreplaceable," that there could be no finding of extraordinary family circumstances. The Fourth Circuit did not in this case, nor has it in any reported case suggested what circumstances it would consider to be "extraordinary." If the methodology and standard of review employed by the Fourth Circuit is sustained, it is difficult to fathom any case that would meet the bar set by the Fourth Circuit for what is "extraordinary."

This Court should grant this Petition. It is critical to re-affirm this Court's recognition in *Koon* of the importance and primacy of the discretion of an experienced district court in making sentencing decisions. Additionally, it is essential that appellate courts be cautioned not to simply substitute their judgment for that of the district court in instances where the district court makes rational and informed sentencing decisions as to whether a departure under 5H1.6 or any other provision of the Guidelines is appropriate. This Court should hold that the Fourth Circuit erroneously equated "extraordinary" under 5H1.6 with unique or "irreplaceable" and not with, as this Court has previously said, what is "exceptional."

The Petitioner's family circumstances, considered under 5H1.6, were "extraordinary" and the totality of the circumstances and combination of factors, including both the family circumstances and the Petitioner's personal circumstances, were also properly considered and weighed by the district court as proper bases for a departure pursuant to 5K2.0. Other Circuit Courts have found similar or less extraordinary circumstances to be sufficient under 5H1.6.

This Honorable Court should grant this Petition to address the split in the Circuits as to what factual predicate is sufficient to be considered "extraordinary" pursuant to 5H1.6 and 5K2.0 and to direct and remind the appellate courts that the district court findings are entitled to substantial deference and that appellate courts are not to simply substitute their judgments, in such a sentencing matter such as presented in this Petition, for that of the district court.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the judgment of the Fourth Circuit be reversed.

Respectfully submitted,

ROBERT C. BONSIB
6411 Ivy Lane, Suite 116
Greenbelt, Maryland 20770
301-441-3000
Counsel for Petitioner

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. OLLIE BRYAN STONE, *Defendant-Appellant.*	No. 02-4319
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JAMES L. YATES, *Defendant-Appellant.*	No. 02-4461
UNITED STATES OF AMERICA, *Plaintiff-Appellant*, v. JAMES L. YATES, *Defendant-Appellee.*	No. 02-4541

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Andre M. Davis, District Judge.
(CR-00-530)

Argued: September 25, 2003

Decided: January 22, 2004

Before WILKINSON, TRAXLER, and GREGORY, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: Robert Charles Bonsib, MARCUS & BONSIB, Greenbelt, Maryland; Allen Howard Orenberg, DILWORTH PAXSON, L.L.P., Washington, D.C., for Appellants. David Ira Salem, Assistant United States Attorney, Greenbelt, Maryland, for Appellee. **ON BRIEF:** Thomas M. DiBiagio, United States Attorney, Ronald J. Tenpas, Assistant United States Attorney, Greenbelt, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellants Ollie Bryan Stone and James L. Yates were both convicted of conspiracy to defraud the United States government in violation of 18 U.S.C.A. § 371 (West 2003) and of filing false claims upon the United States government in violation of 18 U.S.C.A. § 287 (West 2003). Stone also pleaded guilty to filing false income tax returns between the years of 1994 and 1997 in violation of 26 U.S.C.A. § 7206 (West 2003). The district court sentenced Stone to eighty-four months imprisonment, and sentenced Yates to sixty days imprisonment to be served by intermittent confinement for thirty weekends. Stone and Yates

appeal, raising various challenges to their convictions and sentences. The government cross-appeals Yates's sentence. We affirm the convictions of Stone and Yates, as well as Stone's sentence, but we vacate Yates's sentence and remand for resentencing.

I.

In 1988, Ollie Bryan Stone began employment as an electrician with the General Services Administration ("GSA") at the Suitland federal complex in Suitland, Maryland ("Suitland"). By 1995, Stone was recognized by most of the building managers at Suitland as "sort of the lead electrician." J.A. 290. While at Suitland, Stone also served as a team leader for employees in charge of electrical repairs. As a team leader, Stone determined whether electrical repairs could be handled by Suitland electricians or needed to be outsourced to a private contractor. Those outsourced projects costing more than $2,000 were assigned to a private contractor after a bidding process. For those outsourced projects costing less than $2,000 – "micropurchases" – bidding was not required and an expedited approval process was used. Under this expedited process, the GSA employee requesting the repair work (the "buyer"), in this case Stone, completed an internal GSA form known as a Form 2010. This form documented the work being requested, the outside contractor's name and address, and the cost of the services being rendered.

The buyer would submit both the completed Form 2010 and the contractor's invoice to a building manager or some other employee authorized to approve the request. In most instances, prior approval by a building manager was required before work could commence; however, if an

emergency repair was required, buyers were authorized to have the work done and then to seek approval after the fact.

Because Stone served as a team leader for Suitland's electricians and was recognized as a "lead electrician," Stone usually prepared the Forms 2010 for electrical repairs. Many of the building managers charged with reviewing and approving Stone's requests had no electrical training. Consequently, they relied upon the representations made by Stone in the Form 2010s.

At some point, Stone began approaching Christian Fitzgerald, Michael Lewis, and James Clark, contractors who were doing legitimate work at Suitland, and asking these contractors to either inflate their invoices for work done at Suitland or submit false invoices for work never done at GSA.[1] They agreed and the scheme evolved.

Stone would generally categorize the invoices as being for emergency work, allowing him to request payment without having prior approval. Upon receiving payment from GSA, Fitzgerald, Lewis, and Clark would provide Stone with his share of the overcharges through gifts and cash payments. Among the gifts Stone received were an all-terrain vehicle, furniture, guitars, a hot tub, and bloodhounds. The contractors also performed free work on Stone's home.

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[1] All three contractors pleaded guilty to conspiracy to defraud the federal government.

Stone also enlisted the assistance of his accountant, Jim Yates, to recruit additional participants in the conspiracy and to prepare false paperwork to conceal the scheme. As a result, Yates approached Nicholas, Giuseppe, and Frank Gallo (the "Gallos") about forming new contracting companies or using their existing companies to submit false invoices to Suitland.[2] Yates was a family friend of the Gallos and performed accounting work for them. In an effort to convince the Gallos to participate in Stone's scheme, Yates explained that he would prepare the paperwork for the formation of the companies. Yates further explained to the Gallos that the work would be completed by subcontractors hired by Stone, thus minimizing the risk to the Gallos. Moreover, Yates explained that he would prepare the invoices and forward the payments received by the Gallos to Stone. Stone would then use the money to pay the subcontractors. In return for their cooperation, the Gallos were promised ten percent of the payment received from GSA.[3]

In 2000, GSA and the Internal Revenue Service ("IRS") began a joint investigation into the activities of

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[2] In 1996, Yates also approached Antonio DeLeonibus about establishing a general contracting company. Yates did so despite having knowledge that DeLeonibus was not qualified to do general contracting work. To entice DeLeonibus to join the scheme, Yates described the proceeds of the scheme as "free money." Despite Yates's efforts, however, DeLeonibus declined to participate in the conspiracy.

[3] At trial, the Gallos testified that they never received the ten percent they were promised. The Gallos did not have personal knowledge about whether the work was performed by other contractors or what was done with the money they gave to Yates. At about the same time, the Gallos also performed contracting work on Stone's and Yates's homes.

Stone and his co-conspirators. As a result of this investigation, several search warrants were issued.

Upon learning of the search warrants, Stone sought to cover up the scheme. He called Lewis and instructed him to contact the Gallos and Yates. In response, Lewis set up two meetings with Yates. During the first meeting, Yates, who was carrying a firearm, instructed Lewis to undress to ensure that he was not wired. After determining that Lewis was not wired, Yates reviewed with Lewis the items Lewis had purchased for Stone as kickbacks. Yates later returned to Lewis two guitars Lewis had purchased for Stone.

As part of his effort to conceal the scheme, Yates also contacted Fitzgerald and offered to prepare false paperwork that would create the impression that Stone worked for Fitzgerald. It was hoped that this false paperwork would help explain any gifts provided to Stone by Fitzgerald. Yates even visited Fitzgerald's home and inspected his records to determine the best way to create the appearance that Stone was employed by Fitzgerald. Despite Yates's repeated attempts to convince Fitzgerald to help conceal the scheme, Fitzgerald declined to assist Yates and Stone and did not have any contact with them after Yates's visit to his home.

Notwithstanding the efforts of Stone and Yates to conceal the scheme, GSA and the IRS gathered sufficient evidence to obtain a grand jury indictment. On October 25, 2000, the grand jury returned a twelve-count indictment

charging Stone, Yates, and others.[4] The indictment was subsequently superseded by a fourteen-count indictment filed on October 18, 2001. Count One charged Stone and Yates with conspiracy to defraud the United States government. Counts Two through Ten charged Stone with filing false claims upon the United States government. Counts Six through Eight also charged Yates with filing false claims. Counts Eleven through Fourteen – which were severed from the other counts prior to trial – charged Stone with filing false income tax returns, charges to which Stone later pleaded guilty.

The district court sentenced Stone to a term of eighty-four months imprisonment. In sentencing Stone, the district court departed upward pursuant to Section 2T1.1(b)(2) (use of a sophisticated means) and Section 3B1.3 (abuse of a position of trust or use of a special skill) of the Sentencing Guidelines. *See* United States Sentencing Commission, *Guidelines Manual,* §§ 2T1.1 & 3B1.3 (Nov. 1997) ("U.S.S.G.") The district court, however, continued Yates's sentencing hearing in order to determine whether Yates's family circumstances warranted a downward departure. The district court later determined that a nine-level downward departure was warranted under Sections 5H1.6 and 5K2.0 of the Sentencing Guidelines. The district court also imposed a three-level upward adjustment pursuant to Section 3B1.1 (manager or supervisory role in the offense) of the Sentencing Guidelines. As a result, the

[4] Fitzgerald later pleaded guilty to a separate criminal information filed by the government and agreed to cooperate with the government in its case against Stone and Yates.

district court sentenced Yates to sixty days imprisonment to be served over thirty weekends.

II.

The defendants first argue that the district court erred by denying their motions for severance. We review a district court's denial of a motion to sever for an abuse of discretion. *See United States v. Ford,* 88 F.3d 1350, 1361 (4th Cir. 1996). Both Stone and Yates argue that severance was required because they presented antagonistic defenses. Yates also argues that the district court erred in denying his motion for severance because of the prejudicial spillover evidence relating solely to Stone. We will address each of these contentions in turn.

A.

Claiming mutually antagonistic defenses, Stone and Yates initially assert error in the district court's denial of their motions for separate trials under Rule 14 of the Federal Rules of Criminal Procedure. We find no merit in this argument.

Defendants who are alleged to have participated in the same transaction or series of transactions may be charged in a single indictment. *See* Fed. R. Crim. P. 8(b). "The basic rule is that persons who have been indicted together, particularly for conspiracy, should be tried together." *United States v. Tipton,* 90 F.3d 861, 883 (4th Cir. 1996). Rule 14 of the Federal Rules of Criminal Procedure provides that the court may grant a severance if it appears that a defendant or the government is prejudiced by a joinder of the defendants for trial. *See* Fed. R. Crim. P. 14. "Antagonistic defenses do not *per se* require

severance, even if the defendants are hostile or attempt to cast blame on each other." *United States v. Becker,* 585 F.2d 703, 707 (4th Cir. 1978); *see also Zafiro v. United States,* 506 U.S. 534, 538 (1993). In order to obtain a severance on the ground of conflicting defenses, the parties must demonstrate that "the conflict is so prejudicial that the differences are irreconcilable, 'and that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.'" *Becker,* 585 F.2d at 707 (internal quotation marks omitted).

The defendants' argument hinges on the fact that there were discrepancies in the trial testimony given by Stone and Yates regarding the Gallos' involvement in the conspiracy. At trial, Yates testified that he turned over to Stone the cash given to him by the Gallos and, like the Gallos, assumed that Stone had subcontractors perform the work at Suitland. Stone, in his defense, denied any involvement with the Gallos and disclaimed the receipt of any money either directly from the Gallos or indirectly through Yates. As a consequence of this conflicting testimony, Stone and Yates argue, they were unfairly prejudiced because the jury unjustifiably would have inferred that this conflict alone demonstrated that both Stone and Yates were guilty.

"A defendant must show prejudice in order for the court's ruling to constitute an abuse of discretion." *United States v. Porter,* 821 F.2d 968, 972 (4th Cir. 1987). "No prejudice exists if the jury" can "make individual guilt determinations by following the court's cautionary instructions" and "appraising the independent evidence against each defendant." *Id.* Neither Stone nor Yates has made the requisite showing of abuse of discretion by the district court. Each defendant was able to put forth his own

individual theory of the case. When necessary, the district judge issued instructions to limit any potential prejudice inherent in a witness's testimony. These cautionary instructions allowed the jury to make individual guilt determinations. In light of the overwhelming evidence against both Stone and Yates, the jury was well within its province to convict each appellant. Indeed, the jury was not required to rely on either defendant's testimony in order to conclude that they were both guilty, and we see nothing about the allegedly conflicting testimony that is unfairly prejudicial to Stone or Yates. Independent testimony and documentation supplied ample evidence to connect both Stone and Yates to the conspiracy. Because the defendants have failed to demonstrate that the antagonistic defenses alone resulted in conviction, we conclude that the district court did not abuse its discretion in denying their severance motions.

B.

Yates further contends that the district court erred in denying his motion for severance because of the danger of prejudicial spillover of evidence relating solely to Stone. This argument also fails.

As we have already noted, defendants charged in the same conspiracy indictment should ordinarily be tried together. *United States v. Roberts,* 881 F.2d 95, 102 (4th Cir. 1989). "The fact that the evidence against one defendant is stronger than the evidence against other defendants does not in itself justify severance." *United States v. Brooks,* 957 F.2d 1138, 1145 (4th Cir. 1992); *see also United States v. Hargrove,* 647 F.2d 411, 415 (4th Cir. 1981). "If this were the case, motions to sever, which are rarely

granted in conspiracy cases, . . . would have to be granted almost as a matter of course." *Brooks,* 957 F.2d at 1145 (citation omitted). Rather, the party moving for severance must establish that prejudice would result from a joint trial, not merely that separate trials would result in a better chance of acquittal. *See United States v. Parodi,* 703 F.2d 768, 780 (4th Cir. 1983). The defendant must show that he or she was deprived of a fair trial or suffered undue prejudice. *See, e.g., United States v. Samuels,* 970 F.2d 1312, 1314 (4th Cir. 1992); *United States v. Brugman,* 655 F.2d 540, 543 (4th Cir. 1981).

Our review of the record convinces us that Yates cannot meet this heavy burden. Not only would much of the evidence admitted against Stone have been admissible at a separate trial to show the nature of the conspiracy with which Yates was charged, but the evidence adduced against Yates was also more than ample to sustain his convictions. Under these circumstances, it cannot be said that the district court abused its discretion in denying the motion for severance.

III.

Yates further maintains that the government proved not one conspiracy, but multiple conspiracies. To support this contention, Yates notes that (1) he had nothing to do with Clark; (2) neither Clark nor Yates knew of the other's involvement; and (3) Yates's involvement with Fitzgerald and Lewis only occurred after the 1999 search warrant was executed. Because Yates allegedly had nothing to do with the conspiracy involving Stone, Fitzgerald, Lewis, and Clark, Yates argues, he should have only been tried as part of the Stone and Gallos conspiracy.

In our view, the evidence is more than sufficient to support a finding of a single conspiracy. That Yates never knew of Clark's involvement and only became involved in later criminal activities is irrelevant. *See United States v. Johnson,* 54 F.3d 1150, 1154 (4th Cir. 1995) (concluding that evidence established a single conspiracy even if the members of the conspiracy did not know each other or had limited contact with each other); *United States v. Banks,* 10 F.3d, 1044, 1054 (4th Cir. 1993) ("[O]ne may be a member of a conspiracy without knowing its full scope, or all its members, and without taking part in the full range of its activities or over the whole period of its existence.").

IV.

We turn now to Stone's contention that the district court's denial of his motion to reopen his case following the testimony of Yates, his co-defendant, denied Stone his constitutional right to present defense witnesses. At trial, Stone put on his case-in-chief first, followed by Yates. The parties did not object to proceeding in this order. Near the end of the trial, and after Stone had presented his case, Yates testified. His testimony, as the district court described it, "just absolutely slamm[ed] Mr. Stone." J.A. 1403. While the district court was initially concerned about the fact that Yates, as the last defendant to put on a case, "literally [became] a government witness against another defendant [Stone]," upon further reflection the court noted that it did not find the conflict to be as profound as it did on first impression. *See* J.A. 1402, 1420.

It is within the district court's sole discretion to reopen a case to admit new evidence. *United States v. Abbas,* 74 F.3d 506, 510 (4th Cir. 1996). When reviewing

whether or not the district judge abused his discretion in not reopening the case,

> we examine (1) whether the party moving to reopen provided a reasonable explanation for failing to present the evidence in its case-in-chief; (2) whether the evidence was relevant, admissible, or helpful to the jury; and (3) whether reopening the case would have infused the evidence with distorted importance, prejudiced the opposing party's case, or precluded the opposing party from meeting the evidence.

Id. at 511. In order to prevail under this test, Stone must satisfy each prong. If Stone is unable to substantiate even one prong, "due deference is given to the discretion of the sitting judge." *Id.*

After analyzing the first prong, we conclude that Stone did not provide the district court with a reasonable explanation of why he was unable to present the evidence during his case-in-chief. Yates testified as to Stone's relationship with the Gallos and stated that he prepared invoices for the Gallos based upon Forms 2010 that were provided by Stone. He also stated that Stone organized the subcontractors who were supposed to perform the work for the Gallos at Suitland. Yates further testified that once GSA paid the Gallos for the work allegedly done at Suitland, one of the Gallos would cash the check and hand the money back over to Yates who would then give the entire sum to Stone. While Stone contends that Yates's hostile testimony came as a surprise, the record indicates that Stone had reason to expect that Yates's testimony could contradict him. The record indicates that, prior to trial, the government provided Stone's counsel with a transcript of the Gallos' grand jury testimony, in which

they described their activities in a manner consistent with Yates's trial testimony.

Stone is also unable to satisfy the second prong of the test. If allowed to reopen his case, Stone himself was to be placed back on the witness stand. Because Stone's general defense throughout the trial was to deny all allegations put forth, his testimony could not have provided much new information.[5] Thus, because Stone is unable to meet all the necessary criteria, we find that the district court did not abuse its discretion in denying his motion to reopen his case-in-chief.

V.

Stone and Yates maintain that the district court erred when it denied their joint motion to continue the trial to allow defense counsel time to examine certain medical records or, in the alternative, to exclude the testimony of Fitzgerald. Fitzgerald was one of three GSA contractors who pleaded guilty to charges related to the conspiracy to defraud GSA. In August 2001, during the course of his plea colloquy with the district court, Fitzgerald disclosed that he was under treatment by a mental health counselor. Shortly before trial in the instant case, the government

[5] At trial, Stone denied any involvement with the conspiracy to defraud the government. He specifically denied any involvement in the arrangements made for the Gallos' companies to do work at Suitland. He denied speaking with Yates about the Gallos and their alleged work for GSA. He also denied telling Yates that the Gallos would get ten percent back from any GSA project to which they lent their name. Stone further denied receiving any money from Yates and specifically denied receiving any money for jobs the Gallos supposedly completed at Suitland.

received the pre-sentence report for Fitzgerald, which further described his treatment and indicated he was suffering from Bipolar II disorder. Approximately one week before the trial, the government disclosed this information, along with information pertaining to two prior alcohol-related arrests, to the defense. At roughly the same time, Fitzgerald's attorney asked the district court to seal the transcript of the guilty plea and provided the district court with a copy of his client's medical records. Neither the government nor the defendants had copies of those records.

Upon learning of the information pertaining to Fitzgerald, the defendants filed a motion for continuance to allow for a complete review of Fitzgerald's medical records by counsel and a defense expert. In the alternative, the defendants sought exclusion of Fitzgerald's testimony, claiming among other things that their lack of access to his records interfered with their Sixth Amendment rights to confront and cross-examine the government's witness. The district court denied the motion for a continuance. After conducting an *in camera* review of Fitzgerald's mental health records, the district court also denied the motion to exclude Fitzgerald's testimony. The district court did, however, permit the defendants to cross-examine Fitzgerald as to the existence of his psychiatric treatment and alcohol abuse issues, but the court prevented defendants from probing in great detail into such treatment.

The defendants contend that the denial of access to Fitzgerald's mental health records violated their Sixth Amendment right to confrontation and irreparably prejudiced them. They argue that because the government's case rested on Fitzgerald's testimony and their defense centered on attacking his credibility, they were entitled to

Fitzgerald's mental health records for use in cross-examination. We may reverse the district court's denial of the defendants' motion only for an abuse of discretion. *United States v. McMillon,* 14 F.3d 948, 955-56 (4th Cir. 1994).

The opportunity for cross-examination is central to the constitutional right of confrontation. *See Davis v. Alaska,* 415 U.S. 308, 315-16 (1974). This constitutional standard is met when defense counsel is enabled to bring before the jury facts bearing on a witness's reliability. *Id.* at 318. In this case, the defendants were able to bring to the jury's attention the facts affecting Fitzgerald's credibility without accessing his mental health records. There was no need to disclose Fitzgerald's mental health records to defense counsel. The district court permitted the defendants to rigorously cross-examine Fitzgerald, allowing them to bring before the jury facts bearing on Fitzgerald's reliability. Counsel for Stone questioned Fitzgerald at length about his psychiatric treatment. Fitzgerald acknowledged that he suffered from Bipolar II disorder, that he was currently under treatment, that he had seen as many as five different doctors over time, that he was on specific medication, that he occasionally self-medicated, that he was confused at times, that he had disorganized thinking, and that he had trouble sleeping and experienced depression. Counsel for Stone also questioned Fitzgerald about his arrests for drunk driving. Counsel for Yates touched on the same subjects, and questioned Fitzgerald about his marital problems. Thus, the facts of Fitzgerald's mental state and treatment were disclosed in great detail to the jury. Denial of access to the records, therefore, did not deprive Stone and Yates of their right to confrontation.

In addition, even if we were to conclude that it was an error to deny the defendants access to Fitzgerald's mental health records, such error would be harmless. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (holding that the denial of a defendant's opportunity to cross-examine a witness is subject to harmless-error analysis). Fitzgerald was one of three government cooperators providing testimony regarding the defendants' involvement in a scheme to defraud GSA. Thus, given the extent of the government's evidence and the defendant's ability to cross-examine Fitzgerald, we find that any error was harmless.

VI.

We turn next to the defendants' contention that the district court erred in its jury instructions. The decision whether to give a jury instruction and the content of an instruction are reviewed for abuse of discretion. *United States v. Russell*, 971 F.2d 1098, 1107 (4th Cir. 1992). Yates contends the district court erred by giving a "willful blindness" instruction. Stone and Yates also argue that the district court should have given an instruction defining reasonable doubt. Again, we disagree.

A.

Yates first contends that the district court erred in giving a willful blindness instruction with respect to Counts Six and Seven, which charged Yates with submitting and causing the submission of false claims to GSA. A willful blindness instruction allows a "jury to impute the element of knowledge to [a] defendant if the evidence indicates that he purposely closed his eyes to avoid knowing what was taking place around him." *United States v.*

Schnabel, 939 F.2d 197, 203 (4th Cir. 1991). Yates contends that the willful blindness instruction was erroneously given because there was insufficient evidence presented of deliberate ignorance, but instead, only evidence of actual knowledge on his part. As this court has previously stated, however, "[a] willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge but the evidence supports an inference of deliberate ignorance." *Abbas,* 74 F.3d at 513 (internal quotation marks omitted). "The record need not contain direct evidence, however, that the defendant deliberately avoided knowledge of wrongdoing; all that is necessary is evidence from which the jury could infer deliberate avoidance of knowledge." *United States v. Whittington,* 26 F.3d 456, 463 (4th Cir. 1994).

Yates asserted a lack of knowledge that the Gallo invoices he prepared were false. At trial, the government introduced evidence of a wide variety of unusual activities engaged in by Yates relating to the preparation and submission of the invoices. For example, Yates prepared invoices at Stone's request, but Yates never contacted any of the subcontractors who had ostensibly performed the work, nor did he request copies of any receipts from the subcontractors. This evidence easily supports the inference that if Yates was unaware of what was going on, it was only because he deliberately shut his eyes to it.[6] Accordingly, we

[6] As described at trial, Yates worked as a CPA and was employed, for a time, in the Inspector General's Office of the Department of Health and Human Services ("DHHS"), which investigated criminal activity involving DHHS, including fraud. Thus, Yates was familiar with government fraud. Yates's professed ignorance in the face of these

(Continued on following page)

find that the district court did not err in giving the jury a willful blindness instruction.

B.

Finally, defendants argue that the district court erred by refusing to define reasonable doubt. "The law is well-settled in this Circuit that a judge is not allowed to define reasonable doubt unless requested to do so by the jury." *United States v. Patterson,* 150 F.3d 382, 389 (4th Cir. 1998). Therefore, we find that the district judge did not abuse his discretion in refusing to define reasonable doubt.

VII.

Both Stone and Yates also challenge their sentences. Stone contests the two-level sentencing enhancement for abuse of a position of trust and use of a special skill under Section 3B1.3 of the Sentencing Guidelines. Stone also contests the two-level sentencing enhancement for the use of sophisticated means to commit an offense under Section 2T1.1(b)(2) of the Sentencing Guidelines. Yates contests the three-level sentencing enhancement for his role in the offense under Section 3B1.1(b) of the Sentencing Guidelines. We address each contention in turn.

A.

Stone argues that the district court erred in assessing a two-level enhancement under U.S.S.G. § 3B1.3 for abuse

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condemning circumstances suggests a deliberate avoidance of knowledge of the use of false and inflated invoices.

of a position of trust and the use of a special skill to facilitate or conceal the commission of a crime.[7] We review for clear error the district court's factual findings that support the enhancement. *United States v. Mackey,* 114 F.3d 470, 475 (4th Cir. 1997) (concluding that whether defendant abused a position of trust was a factual determination); *United States v. Helton* 953 F.2d 867, 869 (4th Cir. 1992) (concluding that whether defendant abused a position of trust or used a special skill is a factual question). To the extent the district court undertakes a legal interpretation of any guideline, our review is de novo. *United States v. Gormley,* 201 F.3d 290, 294 (4th Cir. 2000).

(1)

We turn first to Stone's challenge to the district court's decision to enhance his sentence based on an abuse of trust. "The basic question" is whether Stone, by submitting false or inflated Forms 2010, "abused a position of trust with respect to the victims of his fraud scheme within the meaning of Guidelines § 3B1.3." *United States v. Caplinger,* 339 F.3d 226, 236 (4th Cir. 2003). "Determining what constitutes a position of trust for the purposes of

[7] Under U.S.S.G. § 3B1.3, the court may assess a two-level enhancement if the defendant abused a position of trust or used a special skill to facilitate or conceal the commission of a crime. In applying the enhancement in this case, the district court concluded that Stone both abused a position of trust and used a special skill to facilitate or conceal the commission of the crime. While the district court relied on both grounds in deciding to assess the enhancement under Section 3B1.3, a district court need only find one of the grounds is satisfied in order for the enhancement to apply.

§ 3B1.3 is not a simple task." *United States v. Morris,* 286 F.3d 1291, 1296 (11th Cir. 2002) (internal quotation marks omitted).

Under Section 3B1.3 of the Sentencing Guidelines, a district court must increase a defendant's sentence by two levels "[i]f the defendant abused a position of public or private trust" and that abuse "significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3; *see also United States v. Akinkoye,* 185 F.3d 192, 203 (4th Cir. 1999). The commentary to the Sentencing Guidelines explains that

> "[p]ublic or private trust" refers to a position of public or private trust characterized by professional or managerial discretion. . . . For this enhancement to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense. . . . This adjustment for example, would apply in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination.

U.S.S.G. § 3B1.3, comment. (n.1).

This court has identified several factors that courts should consider in determining whether a defendant held a position of trust.

> First, courts ask whether a defendant had special duties or special access to information not available to other employees. Second, the defendant's level of supervision or degree of managerial discretion is relevant. Bank tellers who

> embezzle from their employers provide an example of a situation where there is little trust to abuse because the employees are closely supervised, and it is expected that wrongs they commit will be readily detected. Third, the analysis also entails an examination of the acts committed to determine whether *this* defendant is more culpable than others who hold similar positions and may commit crimes.

United States v. Gordon, 61 F.3d 263, 269 (4th Cir. 1995) (internal quotation marks and citations omitted); *see also United States v. Glymph*, 96 F.3d 722, 727 (4th Cir. 1996).

We have emphasized that the "position of trust" inquiry must focus on the relationship between the defendant and the victim from the victim's perspective. *Gordon*, 61 F.3d at 269. "There must be a trust relationship between the defendant and his victim for the enhancement to apply." *United States v. Moore*, 29 F.3d 175, 180 (4th Cir. 1994) (internal quotation marks and alteration omitted). In this case, the primary victim of Stone's scheme was GSA, which was misled by Stone's fraudulent Forms 2010.

In reviewing the factors mentioned above, we cannot conclude that the district court clearly erred in determining that Stone held a position of trust and abused it. Viewed from GSA's perspective, Stone exercised enormous discretion: as a lead electrician, Stone's judgments with respect to necessary repairs ordinarily received great deference. Stone had knowledge about electrical repairs that the building managers who signed off on the Forms 2010 did not. This specialized knowledge allowed him to earn a "position of trust within the employment hierarchy and nobody looked over his shoulder." J.A. 1811. In short,

Stone was entrusted with responsibilities beyond those of other electricians and repairmen at Suitland.

The evidence also clearly shows that Stone used his position in a manner that significantly facilitated the commission or concealment of the crime. He was the initiator of the fraud scheme, he instructed others on how to defraud GSA and on how to avoid detection, and significantly, he was in charge of the electrical repairs that were the basis of the fraud scheme. *See United States v. Johnson,* 4 F.3d 904, 917 (10th Cir. 1993). Stone's instructions to Fitzgerald, Lewis, Clark, and Yates about how to prepare invoices and submit inflated and false Forms 2010 were designed to aid in the commission and concealment of the fraud scheme. Stone's actions significantly facilitated the fraud and constituted an abuse of his position as "lead electrician." Accordingly, we conclude that the district court did not err in increasing Stone's guideline range by two levels for abusing a position of trust.

(2)

In applying the two-level enhancement under Section 3B1.3 of the Sentencing Guidelines, the district court also concluded that Stone used a special skill to facilitate or conceal the commission of a crime. Stone contends that the district court erred because his skills as an electrician did not rise to the level contemplated by the Guidelines.

Section 3B1.3 provides: "If the defendant . . . used a special skill in a manner that significantly facilitated the commission or concealment of the offense, increase [the offense level] by 2 levels." U.S.S.G. § 3B1.3. The analysis of whether Stone's status as an electrician constituted a special skill used to facilitate the crime involves two

distinct questions: (1) whether being an electrician is a special skill within the meaning of Section 3B1.3 of the Guidelines; and (2) whether that skill was used to facilitate the crime. The commentary to the Guidelines explains that "'[s]pecial skill' refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing." U.S.S.G. § 3B1.3 comment. (n.2). The examples of special skills provided in the commentary seem to require more skilled education, training and licensing than is usually associated with being an electrician. *See id.* ("pilots, lawyers, doctors, accountants, chemists, and demolition experts"). Although we do not rule out the possibility that the skills of an electrician may be sufficient for application of Section 3B1.3 in some cases, the record in this case does not justify its application here.

In any event, "to qualify under the guidelines, the special skill must, at a minimum, be used to actually commit or conceal the crime, rather than merely to establish trust in a victim upon whom the defendant then perpetrates a garden variety fraud." *United States v. Hickman,* 991 F.2d 1110, 1113 (3rd Cir. 1993) Moreover, "the case law has generally required a *direct* use of the special skill." *Id.* Stone did not directly use his electrical skills to facilitate this crime. He simply took advantage of his position of trust and used it to defraud GSA. Thus, we conclude that the use of special skill as a basis for the upward adjustment under Section 3B1.3 constituted legal error.

As noted earlier, however, the district court need only find one of the grounds – abuse of a position of trust or use of a special skill – is satisfied in order for the enhancement under Section 3B1.3 to apply. Therefore, because we have

already found that the upward adjustment pursuant to Section 3B1.3 was justified based on Stone's abuse of a position of trust, Stone's sentence need not be recalculated.

B.

Stone also contends that the district court erred by imposing a two-level enhancement for using sophisticated means to impede discovery of his tax fraud offense. *See* U.S.S.G. § 2T1.1(b)(2). We review this claim for clear error. *See United States v. Kontny*, 238 F.3d 815, 821 (7th Cir. 2001).

"Sophisticated means" includes "conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case." U.S.S.G. § 2T1.1, comment. (n.4). Standard examples include hiding assets in offshore bank accounts and conducting business through corporate shells or fictitious entities. *Id.*

The district court applied the two-level enhancement after noting that "the offense characteristic sophisticated means is captured in . . . [this] instance where the income is income in kind and is itself the output of a fraudulent scheme." J.A. 1827. The district court further found that Stone, among other things, "used fictitious entities," and had "people buying dogs in Alabama and bringing them . . . [to] Maryland to make a gift to Mr. Stone" in order to impede discovery of his tax fraud. *Id.*

Stone argues that his tax evasion was not sophisticated because it was nothing more than a failure to report income derived from "side jobs" and income in the form of in-kind benefits received during the conspiracy. We disagree. While it is true that the commentary to the

Sentencing Guidelines "illustrates with examples suggesting a higher level of financial sophistication, . . . the essence of the definition is merely deliberate steps taken to make the offense difficult to detect." *Kontny,* 238 F.3d at 821 (internal quotation marks and alteration omitted). As the Seventh Circuit noted in *Kontny,* "'sophistication' must refer not to the elegance, the 'class,' the 'style' of the defrauder – the degree to which he approximates Cary Grant – but to the presence of efforts at concealment that go beyond . . . the concealment inherent in tax fraud." *Id.*

In this case, Stone received income "disguised as a gift, . . . [as] construction on a personal home, [and as] provision of personal services." J.A. 1828. Even though Stone's actions did not involve the use of offshore bank accounts or corporate shells, his use of "fictional entities to perpetrate the fraud" that created the income, as well as the use of in-kind gifts and services to disguise the unreported income undeniably made it more difficult for the IRS to detect his evasion.

This case does not present the situation where an individual taxpayer merely "completed his individual 1040 tax form with false information to avoid paying some of his federal taxes." *United States v. Jagim,* 978 F.2d 1032, 1042 (8th Cir. 1992). Thus, the district court's finding of sophisticated means was not clearly erroneous.

C.

Yates maintains that the district court erred in imposing a three-level enhancement under Section 3B1.1(b) of the Sentencing Guidelines based upon his role in the offense. Section 3B1.1(b) of the Sentencing Guidelines permits an upward adjustment of three levels if the

"defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants." U.S.S.G. § 3B1.1(b). Role in the offense adjustments are reviewed for clear error. *United States v. Sheffer,* 896 F.2d 842, 846 (4th Cir. 1990). Yates contends that he did not perform the role of a manager or supervisor, and that there was not evidence of five or more participants involved in the activity.

We look first to whether the criminal activity involved five or more participants. "A 'participant' is a person who is criminally responsible for the commission of the offense"; however, that person "need not have been convicted." U.S.S.G. § 3B1.1, comment. (n.1). Both parties agree that Stone, Fitzgerald, and Lewis can be defined as participants. As a member of the conspiracy, Clark is also a participant.[8] Finally, Yates himself can be counted as a participant for purposes of sentencing enhancement, as there is no requirement that there be five participants in addition to their manager. Instead, the enhancement may be applied as long as there is criminal activity that involved five or more participants. *See United States v. Fells,* 920 F.2d 1179, 1182 (4th Cir. 1990); *see also United States v. Wilder,* 15 F.3d 1292, 1299 (5th Cir. 1994); *United States v. Colletti,* 984 F.2d 1339, 1346 (3rd Cir. 1992); *United States v. Montoya,* 979 F.2d 136, 138 (8th Cir. 1992). Thus, there are at least five participants in this criminal activity.

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[8] The fact that Clark had no connection with Yates is irrelevant. Section 3B1.1 of the Sentencing Guidelines does not require the manager, in this case Yates, to have held a managerial role over all of the participants.

Turning to the question of Yates's role in the offense, the record supports the district court's finding that Yates was a manager or supervisor. Yates recruited the Gallos to set up companies through which false work orders were submitted to GSA. As the district court noted, "[Yates] managed [the Gallo branch of the conspiracy] by setting up the companies. He managed it by contacting GSA. He managed it by doing the paperwork." J.A. 1821. Yates also managed the cover-up of the scheme to defraud.

Contrary to Yates's assertion, his role in the offense was not the equivalent of a mere "billing clerk." J.A. 1637. Rather, the evidence clearly indicates that Yates "not only managed [the Gallo branch of the conspiracy], but he actually ran the whole thing," and, at the very least, coordinated the activities of others. J.A. 1821. This is sufficient to warrant the enhancement. Thus, the district court did not clearly err in finding that Yates's role in the offense justified a three-level enhancement under Section 3B1.1(b) of the Guidelines.

VIII.

Finally, the government has cross-appealed Yates's sentence, maintaining that the court erred by departing downward nine levels on the basis of Yates's family responsibilities. Yates responds that it was proper for the court to award him the downward departure because of the extraordinary nature of his family circumstances.

At the sentencing hearing, Yates moved for a downward departure on the basis of several factors, chief among

which were his family responsibilities.[9] The court heard evidence that Yates's son, Adam, was severely disabled and required almost constant care; that Yates's wife, Adam's primary caretaker, was ill and unable to take time to care for herself because of Adam's needs; and that Yates's daughter, a high school student, needed parental support and guidance. The district court, after considering Yates's argument and the government's objection, granted the downward departure on the basis of Yates's family responsibilities pursuant [sic] Section 5H1.6 of the Guidelines.[10] In granting the departure, the district court deemed Yates's family responsibilities to be extraordinary.

> [B]oth Adam's and Mrs. Yates'[s] life will be so undermined, and their support systems will be so at risk if Mr. Yates is away from them for an extended period of time, that I believe and I find that this is the extraordinary circumstance in this rare disfavored guideline factor. . . . Yates'[s] incarceration for 24 months would destroy this family by destroying Mrs. Yates and casting Adam into an abyss out of which I am absolutely convinced he would never climb. . . . So, I find

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[9] Specifically, Yates requested a downward departure on the basis of his medical and mental situation, his employment history, his family responsibilities, and the totality of the circumstances.

[10] The district court granted the downward departure under "both 5H1.6, and, to the extent it adds anything . . . 5K2.0." J.A. 1906. While the court threw "everything [into] the mix" when considering whether a downward departure was warranted, it based its decision primarily on Section 5H1.6 of the Guidelines and Yates's family circumstances. J.A. 1907 & 1893. Specifically, the court noted that it did not "believe a departure [was] appropriate on the basis of Mr. Yates'[s] special medical condition [alone]." J.A. 1893.

> and conclude that a departure, though disfavored, is independently justified under [Section] 5H1.6.

J.A. 1895, 1897, 1901.

Under the Sentencing Guidelines, a district court usually must impose a sentence within the applicable guideline range. *See United States v. Barber,* 119 F.3d 276, 279 (4th Cir. 1997). A sentencing court may depart from the applicable guideline range only when it "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C.A. § 3553(b) (West 2003); *see United States v. Wilson,* 114 F.3d 429, 432 (4th Cir. 1997).

When deciding whether a departure is appropriate, the sentencing court must first establish "whether the potential basis for departure was forbidden, encouraged, discouraged, or unmentioned by the Commission." *Wilson* 114 F.3d at 433. In this case, the district court departed on the basis of Yates's family circumstances, namely his role as a caregiver for his physically and developmentally disabled child. The Guidelines provide, however, that "[f]amily ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." U.S.S.G. § 5H1.6. Thus, the basis for the downward departure employed by the district court in this case is a "discouraged" factor. Where a factor is discouraged, "the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." *United States v. Koon*, 518 U.S. 81, 96 (1996).

This court has previously determined that a departure based on family responsibilities is "permitted only upon a finding that the defendant's family ties or responsibilities are extraordinary." *Wilson,* 114 F.3d at 434. "Generally, a sentencing court may depart downward on this basis only if it finds that the defendant is essentially 'irreplaceable.'" *Elliott v. United States,* 332 F.3d 753, 769 (4th Cir. 2003) (quoting *United States v. McClatchey,* 316 F.3d 1122, 1133 (10th Cir. 2003) (reversing downward departure for defendant based on care for his son because nothing in [sic] record "suggest[ed] that another individual could not provide the necessary assistance in [defendant's] absence")); *see also United States v. Sweeting,* 213 F.3d 95, 104 (3rd Cir. 2000) (reversing downward departure based on defendant's responsibility for child with Tourette's Syndrome because nothing indicated that the defendant was "so irreplaceable that her otherwise ordinary family ties and . . . responsibilities are transformed into the 'extraordinary'").

Although we sympathize with Yates's situation, the record fails to demonstrate that the care he provides is "irreplaceable." To the contrary, the evidence reflects that it is Mrs. Yates, Adam's primary caregiver, rather than Mr. Yates, who is "irreplaceable." While Mr. Yates does indeed play an important role in holding the family together and providing Mrs. Yates a great deal of support, his primary function is that of breadwinner. While Yates's incarceration will undoubtedly make life difficult for this already strained family, the effect of his absence on the family's financial situation and support network is not different

from what any family might face if the primary wage earner were sentenced to continuous imprisonment.[11]

Indeed, this court has found improper Section 5H1.6 departures under circumstances equally as compelling as Yates's. *See Elliott,* 332 F.3d at 768-69 (4th Cir. 2003) (finding that district court abused its discretion in departing downward under § 5H1.6 where defendant was primary caregiver for an incapacitated husband who suffered from cancer, heart disease, diabetes, memory loss and confusion); *Wilson,* 114 F.3d at 434 (reversing downward departure based on § 5H1.6 where father who was 21 years old had remained with his newborn child rather than abandoning child); *United States v. Rybicki,* 96 F.3d 754, 759 (4th Cir. 1996) (holding that district court abused its discretion in departing downward under § 5H1.6 based on defendant's responsibilities for his wife and son, both of whom had medical problems); *United States v. Maddox,* 48 F.3d 791, 799 (4th Cir. 1995) (reversing downward departure for extraordinary family ties where the district court found that the defendant provided invaluable care for his severely mentally disabled sister and his mother and was "crucial to the structure and stability of his family"); *United States v. Bell,* 974 F.2d 537, 538-39 (4th Cir. 1992) (disapproving departure based on § 5H1.6 because defendant's responsibilities in a two-parent family were even less extraordinary than those of a defendant who was a single, custodial parent, despite finding of the district court "that an extended period of incarceration would lead to the destruction of the family"). Accordingly, while we

[11] The district court noted that the family would be able survive financially during the time of Yates's incarceration.

appreciate the difficult circumstances with which the district court was faced, we hold that the finding that Yates's family situation constituted an extraordinarily family responsibility was an abuse of discretion.[12]

IX.

For the foregoing reasons, we affirm Stone's convictions and sentence. We also affirm Yates's convictions, but we vacate his sentence and remand for resentencing in accordance with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

[12] To the extent that the district court based its departure under Section 5K2.0 on the accumulation of several factors, our rejection of the primary factor, Yates's family responsibility, necessarily results in a finding that the district court's departure under Section 5K2.0 was also an abuse of discretion.

Sentencing Proceeding Day 2 of 2
June 4, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	Criminal Docket No. AMD-00-0530
JAMES L. YATES Defendant	)	

Baltimore, Maryland
June 4, 2002
5:23 PM to 6:14 PM

The above-entitled matter continued on for sentencing before The Honorable Andre M. Davis

APPEARANCES

On Behalf of the Plaintiff:
David I. Salem, Assistant U.S. Attorney
Ronald J. Tenpas, Assistant U.S. Attorney

On Behalf of the Defendant James L. Yates:
Robert C. Bonsib, Esquire

* * *

[218] 5K2.0, with the principal consideration under what I refer to as the *Koon* departure, the 5K2.0 ground. A principal ingredient of that ground is, of course, the family responsibility guideline.

So, let me just make a few findings and state my conclusions and then tell you what I intend to do. And then I will hear final allocution from both the government and the defendant.

The family responsibility criterion under 5H1.6, as we all know, is a disfavored ground for departure, and the government certainly has marshaled all of the cases in which courts' refusals to depart on that basis have been upheld. Frankly, maybe I missed it, but I couldn't find a single one in the Fourth Circuit. Maybe I didn't look closely enough, but I actually could not find a family responsibility departure which was challenged by the government and affirmed by the Fourth Circuit. So, it clearly is not a departure that the Fourth Circuit has been called upon, I gather, to evaluate with any great frequency. And that is not surprising because it is, indeed, a disfavored criterion under the Guidelines, and one would assume that, indeed, district judges would rarely, as indeed the Guidelines themselves point out, would rarely resort or rely on that guideline as a ground for departure.

This is that extraordinary case, I am absolutely satisfied. There are two bases for this conclusion. One may [219] be somewhat surprising, but, actually, particularly having listened to Mrs. Yates' testimony, having read her letter, and having assessed her demeanor at the original sentencing proceeding, it's not just Adam, the autistic son, whose life will be – I don't want to overstate this, but I think that both Adam's and Mrs. Yates' life will be so undermined, and their support systems will be so at risk if Mr. Yates is away from them for an extended period of time, that I believe and I find that this is the extraordinary circumstance in this rare disfavored guideline factor.

Mrs. Yates' testimony before me at the original sentencing hearing was compelling and extraordinary. Part of the reason, in all candor, that I continued the sentencing was because I didn't want to continue under the emotional spell, and I don't think that is too strong a way to put it, the emotional spell that came over me in watching her and listening to her testify. What I think I saw, and what I am confident I saw, was a person of extraordinary strength, but who was absolutely on the brink.

I don't know, obviously, from any additional information I have received since that original sentencing hearing, but her testimony in that courtroom was I think riveting not just to the Court but to every person in that room as she described, as she also has done in her letter to the Court dated April 4, 2002, as she described what can only be [220] characterized as an other-wordly commitment to a child whose special needs exceed the bounds of parental capability, in my judgment, for a very, very, very significant percentage of the population.

The idea that she drives her son to this school on a daily basis, and the compelling detailed manner in which she described the day-to-day existence of herself and Adam, as I say, was just a very emotional experience. And, frankly, I didn't want to continue with the sentencing because I wanted to disengage from the emotional tenor and atmosphere which was created by her testimony. She was not remotely pitiful. She was not seeking pity. She was not even seeking an emotional response from the Court.

Part of what made it so riveting and so incredibly compelling was an odd matter-of-fact way that she went about explaining her responsibilities and how she goes

about carrying out those responsibilities. And that same sense of matter-of-fact, but strong, but teetering on the brink, comes through in her letter.

By the way, Mr. Salem, I assume the government has received copies of all the letters that were attached to Mr. Bonsib's submission?

MR. SALEM: That's correct, Judge.

THE COURT: Okay. So, while the focus of Mr. Bonsib's argument, quite properly, in support of a 5H1.6 departure has [221] been on Adam, the fact of the matter is that Mrs. Yates is also very much a part of the overall family responsibilities that Mr. Yates' circumstance brings into play here.

Very, very few parents would be able to do, with the strength and the conviction and the unconditional devotion to her child and to this family, what Mrs. Yates has been able to do. Thus, Mr. Yates' role in the family directly relates to Mrs. Yates and his responsibilities to her, as well as his responsibilities to Adam and her responsibilities to Adam.

The guideline range in this case pre-departure at a level 17 at the bottom end would require Mr. Yates to go off to the Bureau of Prisons for 24 months. That, and I make this finding by clear and convincing evidence based on Mrs. Yates' testimony at this hearing, would destroy this family.

Mr. Yates' incarceration for 24 months would destroy this family by destroying Mrs. Yates and casting Adam into an abyss out of which I am absolutely convinced he would never climb out. Without her, he is lost. He is a lost

soul. And without Mr. Yates, Mrs. Yates, despite her strength, is a lost soul.

And, as I say, the principal evidence on which I am relying, of course, is Mrs. Yates' testimony, as well as the professional reports of Adam's condition. And there clearly is no dispute whatsoever – the government has no interest whatsoever in disputing any aspect of the factual record as it [222] relates to Adam.

The government's contention, and I understand it full well, is really on the law and the exercise of discretion. Given those facts, is this the kind of case that really falls outside of the heartland? And I am absolutely convinced that it is. Yes, offenders in the federal system have special-needs children. Yes, offenders in the federal system are the sole bread winners of their family. Yes, offenders in the federal system are single parents. Yes, offenders in the federal system have responsibility for aged parents and other relatives. Yes, offenders in the federal system have all kinds of family responsibilities. And many of us have family responsibilities, not just offenders in the federal system. So, the Sentencing Commission clearly understood that and said that ordinarily, family responsibility will almost never rise to the level of extraordinary circumstance sufficient to justify a departure. I am absolutely convinced that this is that case.

In addition to the professional assessments of Adam and the testimony and the written testimony of Mrs. Yates, I also rely, frankly, on the letter provided by Mr. Yates' attorney, Wayne Steedman. Mr. Steedman is a very well-known, very highly-respected practitioner of law in the area of special-needs children and the efforts of parents under the Individuals with Disabilities Act to seek

relief from school [223] systems in this state under congressional mandates to provide the often-costly assistance to families with special-needs children in the public school context.

Mr. Steedman's letter presents a compelling case for the impact of Mr. Yates' long-time and long-term incarceration. And, under the circumstances of this case, a two-year period of incarceration would be long-term for this family and for Mr. Yates. Mr. Steedman lays out in very compelling detail the impact that Mr. Yates' absence through incarceration would impose, the hardships that it would impose on the family and, in particular, on Adam.

I just want to quote very briefly one portion of the letter for the record. Mr. Steedman writes at page 2:

> I know that you must impose a penalty on Jim which you feel fits the crime. I have no doubt that you will do what you believe is just. I ask that in making your decision you consider the profound impact Jim's incarceration will have on a child who cannot begin to understand why his father is no longer available to him. Adam *will* regress emotionally and developmentally. The only unknown is how much he will regress and whether he will ever recover from this regression. Children with PDD often do not recover from significant regression, especially a [224] child Adam's age.

I make as my finding Mr. Steedman's observations here. And based on my review of the therapeutic records for Adam, having listened to Mrs. Yates' testimony and having observed her demeanor in the courtroom, I find that this is simply corroborative of everything that I have independently concluded about the impact on Adam of a

two-year period of incarceration that Mr. Yates' sentencing at the guidelines would impose.

As I say, Mr. Steedman practices exclusively in the area of children with special needs. As a member of the bar and an officer of the Court and based on my prior experience with him, – and, again, I don't believe the government has any desire to cross-examine Mr. Steedman. These issues with respect to Adam, again, are not really disputed at all. The question is what the impact is on Mr. Yates' sentence of what is really undisputed evidence.

So, this is that rare case. I don't know whether it is one percent of all federal cases. I'm sure it is not that much. I don't [sic] whether it is half of a percent. I don't know if it is a quarter of one percent. I don't know if it's 1/100 of one percent. But if this is not that rare case, bearing in mind all of the circumstances of the case, including the nature of the offense, the circumstances as shown by the evidence of Mr. Yates' involvement in the offense, and including as well his role in the offense, all of which we discussed at some [225] length in the earlier proceeding, this is that one case out of x number in which, in my judgment, a departure under 5H1.6 is appropriate. Not merely because Mr. Yates is the financial leg on which this family subsists, although he clearly is, and not merely because he has his own personal problems, but really the focus here is on Adam, and, as I say, on Mrs. Yates.

So, I find and conclude that a departure, though disfavored, is independently justified under 5H1.6. However, in the nature of things, this automatically becomes a departure under 5K2.0. The guideline, in fact, specifically

provides that 5K2.0 is available in specifically this situation.

I will read from the 1997 Guidelines Manual some of the policy statement under 5K2.0, and, most importantly, the last paragraph of the policy statement at page 350. The Sentencing Commission says as follows:

> An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination

that is, a 5K2 departure.

> if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the heartland cases covered by the guidelines in a way that is important to the [226] statutory purposes of sentencing.

It has never been the statutory purpose or the common law purpose of any criminal sentence to destroy a family. That has never been a purpose, and nobody would ever suggest that that is a purpose of criminal sentencing. Now, there are a number of different purposes for criminal sentencing, of course – retribution, just punishment, deterrence, both general and specific, and an expression of the community's outrage and disapproval of criminal activity. It seems to me that all of those purposes will be achieved more readily, more humanely, more justly, if the Court relies on the discretion granted by the Guidelines in 5K2.0 to grant the departure that I have described.

It is in nobody's interest that Adam Yates becomes like the GSA, and it is in nobody's interest that Mrs. Yates becomes like the GSA, further victims in this case. That is

exactly what would happen if this Court were to be required to impose a sentence of at least two years incarceration on Mr. Yates.

I have wondered, as I have thought about this over the last several weeks, – and, surely, Mr. Yates has family resources beyond the immediate family, and judging from the letters and attestations of his formerly good character, in my judgment, from people who have written to the Court – whether he and Mrs. Yates couldn't muster together the financial and [227] human resources that would permit the family to carry on in his absence. And I suppose, people being people, and certainly Mrs. Yates having displayed the strength and fortitude and determination that she displayed, although I think it is in very small measure, there could be such mustering, there could perhaps be such marshaling of resources.

It strikes me as quite inappropriate and contrary to the legitimate goals of a criminal sentence to cast Adam Yates as the wild card in that calculation. If the guess about that is wrong, then Adam Yates is the ultimate loser. This Court is not in a position, because of the outrageously-ridiculous, criminal, odious behavior of his father to visit these consequences on Adam Yates. I am satisfied that this is appropriate for the Court to take into consideration.

Obviously, obviously, if Mr. Yates, instead of getting involved in this ridiculous scheme with Mr. Stone and the others, had somehow deemed it appropriate to import five kilograms of crack cocaine from Colombia, or to engage in some other behavior that would take us into the stratosphere guidelines, then we would not be here having this discussion today. No judge, given the circumstances of

some other case involving a very significant sentence, would likely find that the effects on a family and an autistic nine-year-old would be sufficient to grant a significant departure to an offender under such circumstances.

[228] But it seems to me, as I read the policy statement and the few cases that I have looked at, the Sentencing Commission obviously understands that one of the factors the Court takes into account is the effect of the departure on the actual sentence to be imposed. And certainly that is something I have been focusing on very heavily ever since the continued sentencing hearing.

In other words, this business of departure is always, of necessity, a two-pronged analysis. It's great to say, I am going to depart. Or I should depart. Or let's depart. Or how can you depart?

But then the real question becomes, depart from what to what? To what? To what effect?

A departure from 235 months to 188 months obviously means a lot to him or her who would otherwise have to serve the 235 months. I understand full well departures are not to be indulged by a judge who just thinks that the sentence is too high. That is not a proper consideration. And I must say, frankly, I am proud of myself, that I haven't done it in this case. Because I don't think 24 months is too high.

To the contrary, as the government clearly believes as well, based on Mr. Yates' actual involvement in this offense and his circumstances, it's on the low end of an appropriate sentence. The government would even say it's on the very low end of an appropriate sentence.

[229] I think the Court's sentence imposed on Mr. Stone absolutely reflects the Court's view of what the appropriate considerations are, as well as the Court's own findings in the case of Mr. Yates with respect to his role in the offense and other factors.

So, I have to say, if I am patting myself on the back, I'm afraid that every now and then the judge has to do that, but the fact that I – I don't think for one second that a 24-month sentence is inappropriate pre-departure. And I agree with the government. It's way on the low end. Frankly, that bolsters my view that the departure in this case is appropriate, that it is not being indulged at this level for any impermissible ground.

It is not because I think the sentence is too high for Mr. Yates. It is certainly not because I think Mr. Yates doesn't deserve punishment. It is certainly not because I think Mr. Yates really was not guilty. I hope no judge ever goes into a sentencing that way. It's because I believe that Congress, through the Sentencing Commission, has said to Federal District Judges, there are going to be cases occasionally where you are really going to have to exercise your discretion and try to achieve a level of justice because we can't get it right in 100 percent of the cases.

In this case, all things considered, the Sentencing Commission didn't get it right in the Guidelines. It couldn't [230] foresee Adam Yates. It couldn't foresee James Yates. It couldn't foresee Mrs. Yates.

So, for all of these reasons, I find and conclude that under both 5H1.6, and, to the extent it adds anything, and I am confident that it does, 5K2.0, in this case of *United States of America v. James Yates* on three counts of this Superseding Indictment, the Guidelines got it quite wrong.

And, therefore, the Court is compelled to exercise its discretion to make it right – not so much to make it right, but to make it a just and appropriate sentence.

So, it is my intention, counsel, to depart by nine levels to a Level 8, Zone A, with a Criminal History Category of I, a sentencing range of 0 to 6 months. It is my intention to impose a sentence of – well, before I tell you what I am going to do, do you wish to make any comments, ask for additional findings or clarifications or any other matter?

MR. SALEM: Nothing from the government at this time, Judge.

THE COURT: Mr. Bonsib?

MR. BONSIB: No, Your Honor. I think it is implicit in what you said that under 5K2.0, although you emphasized Mrs. Yates and Adam Yates, that it is sort of a totality of circumstances, and, to the extent that by itself Mr. Yates doesn't get us there, I take it the Court is throwing, for whatever it's worth, his particular circumstances into that mix [231] under 5K2.0, even though it might not fit under the 5H1.6?

THE COURT: That's right, Mr. Bonsib. Perhaps I should be a little more specific about that. While Mr. Yates' own mental and psychological and emotional difficulties, both pre-offense and post-offense difficulties as are spelled out in the presentence investigation report, really have nothing to say with respect to 5H1.6, when I get to 5K2, everything is in the mix.

I am considering the nature of the offense, the scope of Mr. Yates' involvement in the offense, and the Court's findings as to offense characteristics and offender characteristics. I am taking into account the relative culpability

of the participants in the scheme. I am taking into account the loss that is attributable to Mr. Yates' involvement in the scheme. And, of course, I understand that the government had a different view about many of those issues. I am taking into account the length of the sentence that would otherwise be imposed, namely, two years, which is the bottom of the Guidelines, and the consequent impact on the family of that length of sentence.

In other words, to be a little more clear, if the bottom of the guideline were 18 months, I may not do my calculus in precisely this manner. But the fact that the applicable guideline is 24 months and the impact on this family that a 24-month sentence is likely to have as opposed to some [232] other sentence is a factor that I have taken into consideration under 5K2.0. So, I am taking into account the totality of the circumstances with respect to 5K2.0, which I don't believe would be otherwise appropriate for me to do under 5H1.6.

I see at the margin there is very little difference between what I am doing under the two – well, that is not exactly true. There is a big difference in what I am doing, frankly, because 5H1.6 is limited strictly to family responsibility. And that, of course, is a disfavored departure ground, whereas 5K2.0 is neither favored nor disfavored. It's the circumstance that the Supreme Court discussed in *Coon* that permits the Court to look at all of the circumstances, make findings, and reach conclusions about what a just and appropriate sentence would be.

So, it is the Court's intention to impose a probationary sentence, at Guideline Level 8 and Criminal History Category I, of three years, with intermittent confinement for 30 weekends.

In other words, it's the Court's intention that Mr. Yates serve 60 days of actual incarceration in a county detention facility on the weekend. And I would have that sentence commence approximately 90 days from today, the goal being, of course, to have Mr. Yates available to the family both for employment, to provide the financial support that the family so desperately needs in order for Adam to continue his [233] education program, to retain the lawyers that the family is going to need to continue the litigation with respect to Adam, and to provide support to Mrs. Yates during the week in dealing with Adam.

It is the intention of the Court that on the weekend, when Adam is not in school, when he does not have to be driven by Mrs. Yates to Baltimore, that Mr. Yates can serve what is admittedly a significantly-reduced period of incarceration, given the facts and circumstances of his offense behavior, so as not to denigrate the seriousness of the offense.

But bearing in mind that Mr. Yates, if this conviction ultimately becomes final, will lose his professional certification, and I understand that is not a ground for departure, and I am not relying on that as a ground for departure, but bearing in mind the totality of the consequences to Mr. Yates and his family, and given Mr. Yates' own precarious mental and emotional state, I am absolutely satisfied that 60 days in jail imposes a very significant punishment on Mr. Yates. I think that is an appropriate sentence.

In contrast to any of the other options that would be available to the Court, such as home confinement, I am concerned that home confinement would run a real risk of seriously denigrating the seriousness of the offense. As we

all know and has been spread on the record, Mr. Yates is [234] confined at home anyway in the manner in which he conducts his business and his working and sleeping habits and, frankly, his family responsibilities. I don't view that as a legitimate sanction. I think weekends in the slammer, particularly for a former deputy sheriff, imposes a significant sanction on Mr. Yates under the circumstances.

The restitution order would be in the amount of $40,000. I arrive at that because – correct me if I am wrong, but I don't believe I made a specific finding as to the amount of the loss for which Mr. Yates was responsible. Or did I? My recollection is that I simply said it was more than $20,000 and no more than $40,000.

MR. SALEM: I think that's right, Judge. I'm looking at my notes from the last sentencing.

THE COURT: I know there was discussion about the Gallo portion of the case, and then there was other discussion about Mr. Tayman, and I simply didn't make a specific finding that, you know, X number of dollars and Y number of cents was Mr. Yates' responsibility here.

I am perfectly satisfied to cut it off at $40,000. I think that that gives Mr. Yates the benefit of the doubt, but I think the evidence is more than sufficient to support a $40,000 restitution order in this case on Mr. Yates jointly and severally, of course, with Mr. Stone and the other participants in the scheme.

[235] MR. BONSIB: Your Honor, I don't remember specifically how you did it. We certainly are not going to quibble, in light of the overall sentence, with what the Court's finding is as long as it is clear that that does not –

I don't know if $40,000 would otherwise take us to the next level up, but as long as it is clear on the record that the Court, for loss purposes, is –

THE COURT: I suppose I could say $39,999. Okay. That will be the amount of restitution, $39,999.

Mr. Yates, would you stand up, please, sir.

(The defendant complied.)

THE COURT: I have advised you of what the Court's intention is here. I have made my findings. Obviously, the government may well take a different view, and this matter may come back and – well, it may come back on a number of different bases. You don't have to say anything, sir, but I will be glad to hear anything you or your counsel wish to say at this point.

THE DEFENDANT: Thank you, Your Honor. I want to thank you for your decision with my family.

THE COURT: All right. It's the judgment of the Court as follows:

The defendant is sentenced, pursuant to the Court's findings and conclusions, at Guideline Offense Level 8, Criminal History Category I, and the sentence is as follows:

[236] Three years supervised probation with the normal conditions of probation and the following special conditions:

Number one, that the defendant serve a period of intermittent confinement in a detention facility designated by the Bureau of Prisons of 60 days to be served as 30 weekends. I am not going to say consecutive weekends

because it may well be that some family emergency relating to Adam or some other factor could come into play. Well, no, I'd better make it consecutive weekends. I'm not sure you can do it any other way, frankly. So, 30 consecutive weekends, a total of 60 days, as a special condition of probation.

A further special condition of probation is that the defendant participate in such substance-abuse treatment and counseling programs as may be directed by the probation officer.

A further special condition is that the defendant satisfactorily participate in a mental health treatment program approved by the probation officer, which may include continued treatment with the defendant's present counselors and therapists.

A further special condition is that the defendant make restitution jointly and severally with others involved in the scheme to the United States Treasury in the amount of $39,999.00. The restitution is to be paid in the minimum amount of $200.00 per month during the period of supervised

* * *